93-459

No.

Supreme Court, U.S.
FILED
SEP 21 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

L. SHIEH, and SAY & SAY,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, ET AL.,

Respondents,

D. Ebershoff, et al.,

Real Party In Interest.

Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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42 pp

THE QUESTION PRESENTED FOR REVIEW

Whether California courts, in denying a new party the right to file one peremptory challenge against the presiding judge within the ten day time limit computed from the new party's date of entry of appearance, violated petitioners' right to fair trial, equal protection and due process.

LIST OF PARTIES

The parties to the proceedings below were petitioners L. Shieh and Say & Say, a California corporation, and the respondent, the Supreme Court of California. The real parties in interest are Fulbright & Jaworski ("FJ") and its individual defendants, Graham & James ("GJ") and its individual defendants, Quinn, Kully & Morrow ("QKM") and its individual defendants, Jeffer, Mangels, Butler & Marmaro ("JMBM") and its individual defendants, several individual defendants in Lewis, D'Amato, Brisbois & Bisgaard ("LDBB"), Sheppard, Mullin, Richter & Hampton ("SMRH") and its individual defendants, and Network Attorney Service ("Network") and its individual defendants. All defendants in this Action are collectively referred to as "Defendants."

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(1) Judgment of the Supreme Court of California, June 24, 1993 (will be supplemented)

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1993

L. SHIEH and SAY & SAY, Petitioners,

v.

SUPREME COURT OF CALIFORNIA, ET AL.,
Respondents,

D. Ebershoff, et al., Real Parties in
Interest.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

To the Honorable William Rehnquist the Chief Justice and Associate Justices of the Supreme Court of the United States.

L. Shieh and Say & Say, the petitioners herein, pray that a writ of certiorari be issued to review the

ruling of the Supreme Court of the State of California entered in the above-entitled case on June 24, 1993.

I. OPINION BELOW

The opinion of the Supreme Court of California dated June 24, 1993, which denied the petition for review is unreported and will be attached in Petitioners' Appendix. The Ruling of the Court of Appeal dated June 11, 1993, which summarily denied the Petitioners' petition for writ of Mandate/Prohibition or Other Appropriate Relief is attached in Appendix page 27. The minute order rejecting the Petitioners' peremptory challenge against the Honorable Ronald E. Cappai of the trial court is printed in Appendix, page 28.

II. JURISDICTION

28 U.S.C. 1651 and the Supreme Court Rule 10.1(c) provide that this Court will review a state judgment by writ of certiorari if "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court."

The California Supreme Court's judgment in question was entered on June 24, 1993. That judgment denied Petitioners' petition for review of a case involving constitutional as well as other federal issues. Therefore, this

Court has jurisdiction to issue a writ of certiorari.

III. FEDERAL LAW INVOLVED

A. A new party has a right to intervene in the action if its interest is not represented adequately and a new party has right to file a peremptory challenge if its interest will be substantially affected by the outcome of the litigation.

B. To deny the petitioner's right to file a peremptory challenge violates Petitioners' right to fair trial, due process, and equal protection.

VI. STATEMENT OF CASE

Plaintiffs filed the First Amended Complaint ("FAC") with the trial court on or about May 18, 1993. The FAC included the corporation Say & Say as additional party plaintiff in the action, and incorporated new causes of actions for specific misconduct committed by Defendants, not previously contained in the original complaint.

Plaintiff Corporation filed its peremptory challenge against the Honorable Ronald E. Cappai also on or about May 18, 1993. Judge Cappai made a minute order rejecting plaintiff Company's peremptory challenge on or about May 25, 1993 on the ground that

the peremptory challenge was "untimely filed". A true and correct copy of the minute order is attached hereto as Appendix, and incorporated hereto by reference. The minute order was received by this office on June 1, 1993.

Judge Cappai's opinion that the peremptory challenge was untimely filed is erroneous. Both the California Civil Procedure (CCP) §70.6 and the Los Angeles Superior Court Rules (LASC) §1104.1 provide that new party plaintiffs have 10 days from the date that they are added as new parties to file their peremptory challenges. Since Say & Say was added as a new party plaintiff on May 18, 1993, it had up to May 28, 1993 to file it's peremptory challenge to Judge Cappai. Further, Say

& Say acted with due diligence and timeliness in filing it's peremptory challenge on May 18, 1993, more than a week before the expiration date of May 28. Therefore, Say & Say's peremptory challenge filed as a new party was timely. Judge Cappai's opinion that it was untimely filed is clearly erroneous. California Practice Guide, Civil Procedure Before Trial by Judge Robert I. Weil and Judge Ira A. Brown, Jr., published by The Rutter Group 1992, at 9:144.1 See also, Swenson v. Superior Court, 202 CA 3d 348, 248 Cal. Rptr. 340 (1988).

Petitioners' attorney filed a Notice of Appeal and "Appellants' Notice to Prepare Reporter's Transcript and Notice of Election to Prepare Appendix"

on June 2, 1993. On the same day, petitioners' attorney filed "Plaintiffs' Objections to Judge Cappai's Rulings; Declaration of James L. Andion in Support Thereof" ("Objection"). Despite the appeal and peremptory challenge by plaintiff Company's lawyer, Judge Cappai still made several judgments, orders and rulings on June 3, 1993.

The above Petitioners' petition of June 2, 1993 was filed in a timely manner, for purpose of vacating Judge Cappai's minute order of May 25, 1993, which was served by mail, and vacating any and all rulings, orders and judgments rendered, made and issued by Judge Cappai subsequent to the date of the filing of the Notice of Appeal, that is June 2, 1993 and/or subsequent to the

date of filing of peremptory challenge, that is, May 18, 1993.

The Court of Appeal, on June 11, 1993, however, summarily denied the Plaintiffs' Petition for Writ of Mandate/Prohibition or other Appropriate Relief. Petitioners then filed a petition for review with the Supreme Court of California, and the petition was denied on June 24, 1993.

V. REASONS FOR ISSUING A WRIT OF CERTIORARI

A. CALIFORNIA RULES ARE AMBIGUOUS REGARDING PEREMPTORY CHALLENGE AND CALIFORNIA COURT ACTED ARBITRARILY IN

DENYING PETITIONERS RIGHT TO FILE A PEREMPTORY CHALLENGE

California Code of Civil Procedure § 176.6(3) limits peremptory challenge to a single filing, even if there is more than one plaintiff on a side. The rule, however, does not define what constitutes a side. Thus the rule is ambiguous. It is also arbitrary because it prevents a new party co-plaintiff from filing a peremptory challenge even though that new party's right or interest could be adversely affected by the instant action.

When the California courts denied plaintiff's right to make a peremptory challenge on the ground that it was "untimely filed," they clearly treated

plaintiff company under the rule 170.6(3) as one side with Shieh, an original individual plaintiff on record. However, the California courts ignored the fact that plaintiff has recently discovered new material evidence which has established a prima facie case that the legal interests of the Corporation have also been injured by the defendants within the proceedings of this action. Therefore, the Corporation has several causes of action against the same defendants within the same pattern of facts as alleged in the FAC, and thus it has standing in the action.

Further, while in the state jurisdictions all the coplaintiffs or codefendants are entitled to only the statutorily enumerated number of

challenges as a side, it has long been held that an exception would be allowed when substantially adverse interests exist between them. People v. Eaker, 161 Cal.Rptr. 417, 100 C.A.3d 1007, certiorari denied, Eaker v. California, (1980) 101 S.Ct. 161, 449 U.S. 859, 66 L.Ed.2d 75. The term "adverse interest" is important in the present case because it will determine whether plaintiff company (Say & Say) has standing to join the action as a new party and therefore whether it is entitled to file a peremptory challenge.

In the case of In re Mallow Hotel Corporation, (1937) D.C.Pa., 18 F.Supp. 15, 17, the term "adverse interest" was defined as that "[I]nterest" which must be involved in the lawsuit in the sense

that, by operation of judgment entered, either a legal right or liability of the witness will be acquired, lost, or materially affected; and to be "adverse" the interest must be such as would be promoted by success of adversary of party calling him.

In Maryland v. Louisiana, (1981) 451 US 725, 68 L. Ed 2d 576, 101 S Ct 2114, 69 OGR 553, this Court granted the motion of pipeline companies to intervene as plaintiffs, where the tax was directly imposed on the owner of imported gas and the pipelines most often owned the gas, the pipeline companies therefore had a direct stake in the controversy. Regratably, however, in the present case, the California courts clearly failed to

realize that plaintiff corporation has a direct interest in this action.

Most significantly, it has been declared that even though a judgment in the action to which he or she is not a party would not be binding on him or her, a person who is primarily or ultimately liable for any judgment between the litigants should be allowed to intervene. Coleman Capital Corp. v. Fidelity & Deposit Co. (SD NY 1967) 43 FRD 407, 11 FR Serv 2d 689. Thus, plaintiff company should be joined in as a necessary and indispensable plaintiff party in this action. See, Bank of California v. Superior Court, 16 Cal. 2d. 516, 106 P 2d 879 (1940).

B. PLAINTIFF COMPANY SHOULD BE ALLOWED AS A NEW PARTY TO FILE A PEREMPTORY CHALLENGE AS A MATTER OF RIGHT

It has long been held in federal courts that intervention has been allowed as a matter of right when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales., 345 US 156 (1952); Sutphen Estates, Inc. v. United States, 342 US 19, reh den 342 US 907 (1951); Atlantic Refining Co. v. Standard Oil Co. 113 App DC 20, 304 F. 2d 387; Pellegrino v. Nesbit (CA9 Cal) 203 F2d 463, 37 ALR2d 1296.

Furthermore, no showing of actual inadequacy is required. Providence Journal Co. v. FBI(DC RI), (1978) 460 F Supp 762, 27 FR Serv 2d 143, revd (CA1 RI) 602 F. 2d 1010, 52 ALR Fed 173, cert den 444 us 1071, 62 L Ed 752, 100 S. Ct 1015. It is generally held that the requirements of inadequate representation under the rule is satisfied if the proposed intervenor shows that representation of his interest "may be" inadequate and that the burden of making that showing should be treated as minimal. Trbovich v. United Mine Workers, (1972) 404 US 528, 30 L. Ed 2d 686, 92 S. Ct. 630. Therefore, neither shall petitioners bear burden nor can the California courts request co-plaintiff to prove certain damage to Company.

C. DENYING PETITIONERS' RIGHT TO FILE PEREMPTORY CHALLENGE IS IN VIOLATION OF PETITIONERS' RIGHT TO DUE PROCESS, FAIR TRIAL AND EQUAL PROTECTION

Since plaintiff company's interest, owned by foreigner, will be adversely affected by the outcome of the action, it should be entitled to intervene in the action as a new party. And because plaintiff company joined in the action, it certainly had a right to file a peremptory challenge.

It has been held that a waiver of a judges's disqualification by one party will not affect the right of other parties to insist upon the disqualification, Lide v. Fidelity &

Deposit Co. 179 SC 161, 183 SE 771. In addition, a precedent in another state jurisdiction also established that a party cannot by waiving a disqualication deprive a corporation, which is also a party, of the right to insist on the disqulification.[1] And much less can a waiver be presumed against persons who are not parties to the original record.[2] Therefore, in the present case the original plaintiff who made no peremptory challenge for whatever reason cannot be understood as making a waiver by plaintiff company of its right to make such challenge.

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1. Georgia Power Co. v. Watts, 184 Ga 135, 190 SE 654, 110 ALR 465 (1937).

2. Rudd v. Woolfolk, 67 Ky (4 Bush) 555.

In Mathews v. Eldridge, (1976) Va.1976, 96 S. Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18, this Court stated: "[The] Fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." See also Orloff v. Cleland, C.A. Cal. 1983, 708 F.2d 372. A similar statement was also made in a federal court: "The right to petition the government for a redress of grievances includes the right of access to the courts, that right is also subject to due process protection in that the opportunity must be at a meaningful time and in a meaningful manner. Matter of N.C. Trading, 1978, 586 F.2d 221, 66 CCPa. 11.[3] It is clear that without

[3].In another federal court, it was also declared: "Essence of due process is

intervention or a peremptory challenge, plaintiff company will lose its opportunity and its right to protect its interest in the action.

If the California peremptory challenge rules are contradictory to the requirement of due process under the U.S. Constitution, the state law should be preempted by the Constitution. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the state of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly [coupled]

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requirement that person in jeopardy odf serious loss be given notice of case against him and opportunity to meet it. Kaczmarczyk v. I.N.S., C.A. Tex.1966, 355 F.2d 212.

with a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (citing Free v. Bland, 369 U.S. 663, 666 (1962)) Id. at 138.

In the present case, the nature of the issue involves a federal claim. California rules are ambiguous and their application are arbitrary. In Brown v. Western Ry., 338 U.S. 294, 296 (1949), this Court held that the federal right granted by the Congress cannot be defeated by the form of local practice. In this case the application of California peremptory challenge rules caused plaintiff company to lose its right to due process and fair trial, and lose its fundamental rights. The application of the ambiguous and

arbitrary rules should be reversed. See, Brown v. Western R. Co. of Alabama, supra, at 298-299. "State courts simply are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right." Felder v. Casey, 487 U.S. 131, 152 (1987).

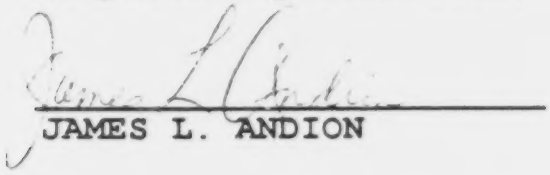
VI. CONCLUSION

Petitioners seek review on a writ of certirari under the United States Supreme Court, Rule 10.1(c). The California rule giving state judges unlimited discretion to deny plaintiff corporation's right to make a peremptory challenge is impermissible and in violation of Petitioners's right to due process fair trial, and equal

protection. It is therefore inconsistent with the U.S. Constitution, and should be preempted under the Supremacy Clause of the United States Constitution the Fourteenth Amendment right to due process of law, right to fair trial and equal protection.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



JAMES L. ANDION

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Counsel for Petitioners
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Dated: September 15, 1993.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 5 DATE: 06/11/93

James L. Andion
301 N. Lake Avenue
Suite 720D
Pasadena, CA. 91101

RE: Shieh, L.
VS.
S.c.l.a.
Ebershoff, David
2 Civil B075718
Los Angeles No. BC061170

THE COURT:

The petition for writ of Mandate, Etc is denied.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Date: May 25, 1993 S. GUILLEN
.Deputy Clerk
Honorable RONALD E. CAPPAI .Judge
R. McGLOTHIN .Court Attendant

NONE .Reporter

BC061170

LIANG-HOUH SHIEH Counsel For Plaintiff

DAVID EBERSHOFF, ET AL. Counsel for Defendant

NATURE OF PROCEEDINGS:
NOTICE OF RULING RE PEREMPTORY CHALLENGE OF JUDGE RONALD E. CAPPAI

The Court determines that the Peremptory Challenge of Judge Ronald E. Cappai filed herein on May 18, 1993 is untimely filed: therefore, it is ordered stricken.

A copy of this minute order is sent via U.S. Mail as follows:

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Minutes Entered: May 25, 1993
Department 23

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my address is: 301 North Lake Avenue, 7th Floor, Pasadena, CA 91101. On September 20, 1993, I served the foregoing document described as "Petition for Certiorari" on all interested parties in this action.

( ) by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:
(X) by placing ( ) the original (X) a true copy thereof enclosed in sealed envelopes addressed as follows:

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(X) BY MAIL

( ) I deposited such envelope in the mail at Pasadena, California. The envelope was mailed with postage thereon fully prepaid.

(X) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it

would be deposited with U. S. postal service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Executed on September 20, 1993, at Pasadena, California.

( ) BY PERSONAL SERVICE I delivered such enveloped by hand to the offices of the addressee. Executed on _____, at Pasadena, California.

( ) (State) I declare under penalty of perjury under the laws of the

State of California that the above is true and correct.

(X) (Federal) I declare that i am employed in the office of a member of the bar of this court at whose direction the service was made.

T. Pan _____

Type or Print Name

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Signature